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No. 07-507

FILED

DEC 28 2007

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SUPREME COURT, U.S.

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In The
Supreme Court of the United States

OKLAHOMA ONCOLOGY & HEMATOLOGY, P.C.
d/b/a CANCER CARE ASSOCIATES,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS,

Respondent,

JPMORGAN CHASE BANK OF TEXAS, et al.,

Real Parties in Interest.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. SUMMARY

Oklahoma Oncology and Hematology, P.C. d/b/a Cancer Care Associates ("CCA" or "Petitioner") requests certiorari to guide the lower courts regarding appropriate legal standards for challenges to federal subject matter jurisdiction, especially in statutory interpleader actions founded on party diversity. Issuance of certiorari is appropriate based on the decision in *Bell Atlantic v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955 (May 21, 2007), and the jurisprudence since the Court's decisions in *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178 (1936) and *Land v. Dollar*, 330 U.S. 731 (1947).

Respondent JPMorgan Chase Bank ("Chase") and Respondents AOR Management Company of Oklahoma and US Oncology, Inc. (collectively, "USON/AOR-OK") contend that there is no circuit split on any issue, that the district court correctly deferred consideration of a jurisdictional challenge that is "intertwined" with the merits of the case, and that mandamus relief is not appropriate.

Although USON's claim to the applicable interpleader stake is wholly derivative of AOR-OK's claim, Respondents give no credence regarding the applicability of *Bell Atlantic* to Petitioner's facial attack. The legal issues raised in the Petition for Writ of Certiorari are novel but important to the law regarding federal jurisdiction. Under the circumstances, mandamus relief is clear and indisputable.

II. CCA PRESENTS VALID JURISDICTIONAL ISSUES TO THE COURT.

A. CCA Has Not Waived Its Facial Attack On Subject Matter Jurisdiction.

USON/AOR-OK contend that CCA has either waived (or failed to "preserve") its facial jurisdictional challenge, both in the district court and in this Court. This argument is factually incorrect. Chase, the interpleading party, contends that CCA has "abandoned its facial argument as Petitioner conceded that the parties are of diverse citizenship, have adverse claims, and that the jurisdictional amount has been met." Chase Brief at 12.

CCA unequivocally contends that the parties are not diverse and that USON has not stated an adverse claim to the fund. In the district court, CCA specifically argued a facial jurisdictional attack in its memorandum of law in support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction. (This document is not included in the Appendix but can be found in the district court proceedings at Docket #91, Ex. 10.) CCA's Petition for Writ of Mandamus in the Fifth Circuit Court of Appeals also states this argument. At every proceeding, CCA has asserted both facial and factual challenges to the district court's exercise of jurisdiction. The issue is ripe for this Court to consider.

B. The Circuits Are Split On Factual Jurisdictional Challenge Standards.

Respondents argue that there is no circuit split regarding to the legal standards for a factual jurisdictional attack. Chase asserts that the Petitioner's cited Sixth and Ninth Circuit cases are "departures" from the precedents of those circuits. *See* Chase Brief at 17.

Although all circuits give district courts wide discretion to evaluate factual challenges, the issue is whether such discretion means that a court can *decline* to consider the factual challenge entirely. The Sixth and Ninth Circuits hold that the district court cannot abdicate this responsibility.

As the party with the burden to prove subject matter jurisdiction, the plaintiff *must* present evidence to rebut the factual challenge. *Golden v. Gorno Bros., Inc.*, 410 F.3d 879, 881 (6th Cir. 2005); *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). This standard is consistent with the prior holdings of those circuits that the court's latitude begins only when evidence is put forward. The cases are not a departure from the prior precedent of the Sixth and Ninth Circuits, respectively.[1]

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[1] The First Circuit in *Valentin v. Hosp. Bella Vista*, 254 F.3d 358 (1st Cir. 2001), also recognized that district courts have both the obligation to consider factual challenges and the discretion to determine the method of consideration.

Chase further contends that the First and D.C. Circuit decisions in *Filetech S.A. v. France Telecom, S.A.*, 157 F.3d 922 (2d Cir. 1998) and *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36 (D.C. Cir. 2007), are inapplicable because they concern the Foreign Sovereign Immunities Act ("FSIA") rights.

The First Circuit's FSIA discussion is analogous to the situation here, a challenge to interpleader jurisdiction. Under the "commercial activity exception," FSIA jurisdiction can be asserted despite immunity (as well as other statutorily defined exceptions). 28 U.S.C. §1605(a)(2). However, "something more than a mere connection with, or relation to, commercial activity" must be shown to establish jurisdiction. *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993).

In *Filetech*, France Telecom alleged that its commercial activities in the United States were too insubstantial to sustain jurisdiction. The First Circuit held as follows:

> In view of the foregoing factual disputes, it was error for the district court to accept the mere allegations of the complaint as a basis for finding subject matter jurisdiction. . . . In these circumstances, the court should have looked outside the pleadings to the submissions. . . .

Filetech, 157 F.3d at 932. The FSIA was not the issue in *Filetech* (and *Phoenix Consulting*); rather, the issue

was the court's sole reliance on the Complaint to resolve a fact issue relating to jurisdiction.

Interpleader carries a similar jurisdiction requirement. An interpleader complaint must allege the existence of valid adverse, diverse claims in order to sustain subject matter jurisdiction. 28 U.S.C. §1335; 7 Charles A. Wright, et al., *Federal Practice and Procedure* §1704 (3d ed. 2001) ("The primary test for determining the propriety of interpleading the adverse claimants . . . is whether the stakeholder legitimately fears multiple vexation against a single fund.").

In the district court, CCA factually challenged USON's claims. CCA further challenged diversity given USON's lack of adversity to AOR-OK, and contended that USON and AOR-OK are alter egos. Under these circumstances, district courts in the First and D.C. Circuits would have to look outside the complaint to resolve the disputed jurisdictional facts.[2]

Relying on Fifth Circuit law, the district court declined to consider CCA's factual challenge. Because some circuits would permit the refusal while other

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[2] "When the defendant has thus challenged the factual basis of the court's jurisdiction, the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff. . . . Instead, the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Phoenix Consulting*, 216 F.3d at 40.

circuits would not, CCA requests that this Court resolve the issue and affirm *McNutt*.

C. A Jurisdictional Challenge Can Only Be Deferred If It Is Intertwined With A Federal Question.

Respondents allege that the district court correctly deferred CCA's factual challenge because it is "intertwined" with the case merits. However, neither Chase nor USON/AOR-OK cite any case where the intertwining exception was applied to diversity jurisdiction. Rather, both the First Circuit (in *Valentin*) and the Fifth Circuit in *Getty Oil v. Ins. Co. of North America*, 841 F.2d 1254 (5th Cir. 1998) addressed this very issue. As stated in the Petition for Writ of Certiorari, the Fifth Circuit in *Getty Oil* rejected the applicability of the intertwining exception to diversity cases. *Getty Oil*, 841 F.2d at 1260 n.8 (recognizing that the exception applies only where the merits issues implicate federal law).

The district court's conclusion that the jurisdictional fact issues are interrelated with the case merits simply lacks validity. The parties' core dispute is immaterial to the diversity analysis. In this interpleader, the sole issue is the determination of which defendant has the most superior right to claim to the fund. CCA's contention that USON has no legitimate adverse, diverse claim to the stake does not require a finding that any party has the most superior claim. Moreover, CCA's contention that USON and AOR-OK

are alter egos does not extinguish USON's claim; it just confers Oklahoma citizenship to USON for diversity analysis.

Federal courts cannot force interpleader defendants to resolve their unrelated disputes in a forum not of their choosing. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967). By assertedly compelling arbitration of the "merits" of the parties' dispute, the district court expands the scope of this interpleader far beyond entitlement to the fund. This is an impermissible overreaching of the court's statutory and Constitutional authority.

D. This Court Has Not Considered The Jurisdictional Provisions Of FAA Sections 3 And 4.

USON/AOR-OK contend that *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193 (2000), resolved any circuit split regarding the jurisdictional provisions of Sections 3 and 4 of the Federal Arbitration Act (the "FAA"). Respondents misconstrue *Cortez*, which interpreted venue (and not jurisdictional) provisions of 9 U.S.C. §§9-11.

FAA Sections 9-11 contain venue provisions that could lead to inconsistent results. Prior to *Cortez*, a federal court could compel arbitration or abate proceedings, but might be prevented from confirming (or vacating) the arbitration it mandated to take place. 9 U.S.C. §§9-11. Requiring that parties go to another

venue to confirm an arbitration award interferes with the "rapid and unobstructed enforcement of arbitration agreements," and these venue provisions were accordingly found to be permissive. *Cortez*, 529 U.S. at 201. In other words, the statutory scheme clearly intends that a district court with authority to compel arbitration also has authority to confirm or vacate the arbitrator's award.

By contrast, FAA Sections 3 and 4 contain no such inconsistency. Read together, a district court can compel arbitration if the parties' agreement requires arbitration to take place within the court's jurisdiction. If the agreement requires arbitration outside of its jurisdiction, the court is authorized only to abate proceedings pending arbitration. 9 U.S.C. §§ 3, 4.

These provisions contain jurisdictional limitations, not just venue limitations. The FAA circumscribe a district court's jurisdiction to compel arbitration when parties have specified venue in their arbitration agreements. This is because the FAA is intended to give parties no more rights than they would have under their contract. The FAA cannot confer greater rights to parties desiring arbitration than their arbitration agreements confer.[3]

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[3] USON/AOR-OK contend that because the district court failed to specify the location of the arbitration, its order does not run afoul of Section 4. USON/AOR-OK miss the point. Under the parties' contract, the district court was prohibited from ordering arbitration taking place anywhere *but* Oklahoma. Under the FAA, the district court lacked authority to compel arbitration to

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III. CCA HAS A RIGHT TO MANDAMUS RELIEF.

Respondents incorrectly contend that mandamus relief is not appropriate. As stated in its Petition for Writ of Certiorari, CCA can show that its right to relief is clear and indisputable, and that it has no adequate remedy at law.[4]

A. CCA's Right To Relief Is Clear And Indisputable.

In their Brief, USON/AOR-OK admit facts that show that CCA's right to the relief sought is clear and indisputable. Describing the nature of USON's claim to the fund, USON/AOR-OK state:

> AOR-OK, as [CCA] Business Manager, was . . . permitted to assign its Business Manager functions and its right to collect its management fee to whomever it wished. *Here, the record supports a conclusion that USON performed as Business Manager functions on behalf of AOR-OK.*

USON/AOR-OK's Brief at 4.

Respondents carefully avoid alleging that AOR-OK *actually assigned* its "Business Manager" functions to

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take place in Oklahoma. Therefore, district court could not order arbitration to take place at all.

[4] CCA contends that the appropriateness of mandamus relief is a merits issue that, should the Court grant the Petition for Writ of Certiorari, CCA intends to fully address in its merits brief.

USON – because AOR-OK did not make any assignment. USON/AOR-OK dance precariously between the Oklahoma courts and the federal district court. To establish diversity in the Texas federal court, USON/AOR-OK must prove that the parties are not "alter egos." However, they must show that they *are* "alter egos" in the Oklahoma litigation in order to compel arbitration in the main dispute.[5] Thus, in these proceedings they carefully word their argument, alluding only to the *possibility* of an assignment.

In the district court, CCA put forth affidavits, exhibits and sworn pleadings on the alter ego issue. Despite repeated opportunities to do so, AOR-OK presented no evidence of an assignment of its MSA responsibilities to any third party, including USON.

This failure of proof is representative of the lack of adversity between USON and AOR-OK. None of the respondents contend that AOR-OK denies USON's claim to the stake, or vice versa. USON is not a necessary party to the interpleader because its claim is wholly derivative of AOR-OK's rights to the stake.

Factual challenge "discretion" to consider the weight of the evidence does not absolve a plaintiff of the burden to prove the existence of jurisdiction. Like the non-movant in a summary judgment proceeding,

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[5] *Oklahoma Oncology & Hematology, P.C. v. US Oncology, Inc.*, 2007 OK 12, ¶24, fn. 15-18, 160 P.3d 936, 945 (Okla. 2007).

the plaintiff must present evidence to establish the fact dispute.

The district court concluded that USON stated a "colorable" claim, *see* Pet. App. 29, but merely stating a colorable claim does not survive either a facial or a factual jurisdictional challenge. The interpleader complaint does not state whether USON's claim to the stake is adverse to AOR-OK sufficient to warrant USON's inclusion in the litigation. Under applicable law and a fair interpretation of Rule 8 pleading requirements stated in *Bell Atlantic*, this is fatal to the exercise of subject matter jurisdiction.

On the factual attack, CCA presented substantial evidence in support of its jurisdictional fact allegations, both in the district court and in the Fifth Circuit. CCA presented affidavits and other documentary evidence proving its alter ego claims and disproving USON and AOR-OK's claims that USON was assigned MSA rights or responsibilities. Respondents made the affirmative choice to make arguments instead of presenting evidence to support their factual allegations. Chase did not provide evidence of a reasonable fear of multiple liability from USON independent of AOR-OK, and USON/AOR-OK did not produce evidence challenging the alter ego and failure to assign allegations.[6] Accordingly, the district court

[6] These are just a few examples of the factual assertions that Respondents contested by argument and not evidence. For example, CCA also provided evidence that Chase failed to interplead the entire fund as required for interpleader jurisdiction.

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lacked any basis to exercise discretion in favor of retaining subject matter jurisdiction.

The pleading failures and undisputed fact issues are independent of the merits of the case, and CCA has a clear right to dismissal of the case on its facial challenge. At a minimum, CCA has an indisputable right to consideration of its factual challenges to jurisdiction in the form of discovery and an evidentiary hearing.

B. There is No Adequate Remedy on Appeal.

Mandamus is also appropriate because the district court's orders have created a procedural morass for which there is no adequate remedy on appeal.

Currently, CCA and USON/AOR-OK are litigating their dispute, which covers the entirety of the parties' complaints, in the Oklahoma Supreme Court and state district court of Tulsa County, Oklahoma. Meanwhile, the issue of entitlement to the interpleader fund, a limited part of the dispute, is being litigated in a Texas federal court-ordered arbitration in Oklahoma.

After the district court entered its initial interlocutory order compelling arbitration, USON/AOR-OK filed that order in the then-pending Oklahoma

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Chase argued against this claim in its response to the motion to dismiss, but offered no evidence substantiating its position.

Supreme Court appeal. USON/AOR-OK contended in the Oklahoma Supreme Court that the Texas court's order should be given res judicata deference. They did so despite their repeated statements in these proceedings that the order is not final and therefore, not appealable.[7]

The piecemeal nature of the litigation creates complex res judicata issues that cannot be undone in an appeal several years later. Respondents have used the district court's rulings as a sword and a shield, claiming they are entitled to res judicata deference while restricting CCA's ability to seek appellate review of them. No court can unwind the inappropriate application of the district court's rulings in other jurisdictions.

Absent review, CCA will lose Constitutional rights (the right not to proceed in a federal forum), statutory rights (the right not to allow an interpleader to resolve unrelated substantive issues), and rights under the parties' own disputed contract (the right to proceed in Oklahoma courts).

III. CONCLUSION

Were a district court to refuse to consider a party's Rule 12(b)(1) motion, mandamus would clearly be

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[7] Before the federal district court reinstated its final order compelling arbitration, the Oklahoma Supreme Court reversed the Tulsa state court's arbitration order and made certain (final) findings. The state supreme court specifically found that CCA was entitled to an evidentiary hearing before the district court ruled on the motion to compel arbitration. Pet App. 155.

appropriate. *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 381 (2004). This is because absent narrow circumstances, federal courts must halt other proceedings and confront subject matter jurisdiction challenges as soon as they are raised. *Rurghas AG v. Marathon Oil Co.*, 526 U.S. 574, 587 (1999). The district court's application of improper standards to CCA's jurisdictional challenges is an abdication of this responsibility, not unlike a refusal to consider a Rule 12(b)(1) motion. Issuance of the writ is necessary to limit the district court in the exercise of its prescribed authority, and to compel the district court to apply appropriate standards to CCA's jurisdictional challenges. For these reasons and the reasons stated in its Petition for Writ of Certiorari, CCA respectfully states that the writ should issue.

Respectfully submitted,

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